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In the Supreme Court of the United States

No. 367

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY and CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals is reported at 245 F. 2d 397.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Judgment of the Court of Appeals was entered June 6, 1957.

The jurisdiction of this court is invoked under 28 U. S. C. A. Section 1254.

In its brief petitioner sets forth under the above heading certain reasons why it says "Review by this Court of the decision of the Court of Appeals for the Eighth Circuit is required." These alleged reasons will not be discussed at this point but will be taken up later.

QUESTIONS PRESENTED FOR REVIEW

Under the above heading, petitioner states what it calls three major questions. The first of these is as follows:

> "Does the discretion to order separate trials of particular issues vested in a District Judge, by Rule 42, Federal Rules Civil Procedure, authorize such an order, in a jury trial, over the objections of a defendant, after the trial has commenced, opening statements of counsel have been made, and evidence of plaintiff has been completed, thereby changing the issues on trial and restricting the scope of evidence which may be offered by defendants, when no application for such order is made by any party, and no intimation was given at the opening of the trial that such order might be made?"

The foregoing question fails to call attention to the fact that the issues as to the cross-claims were not issues as to the plaintiff in the court below; that the separation of the trial on the cross-claims from the trial on the main case did not in any way change the issues; that no jury trial was requested by any party, including the petitioner, as to the issues arising on the cross-claims.

The second question set forth by petitioner is as follows:

> "When it appears that empty freight cars are supplied to a large industrial shipper for loading for outbound shipment by numerous railroad companies, and it is the custom and practice of the shipper, acquiesced in by the railroad companies, to substantially pool the cars so supplied, and load and bill them out on any line of railroad selected by the shipper, and an employee of the industry sustains injury after loading of a car, supplied by one railroad, has been completed for outbound movement on another railroad selected by the shipper, over which the car is immediately billed, does primary liability for defects in the car rest upon the railroad in connection with whose business the car had been loaded, or upon the railroad which supplied the car to the shipper?"

The second question is not based upon the facts in this case. There is no evidence in this case that the parties pooled the cars so supplied. The statement of the question completely leaves out the fact that in this case, as in all such cases where a railroad company delivered a car to the shipper, such railroad car was first of all inspected by the railroad company delivering the car (in this case the petitioner Rock Island); that in fact in the instant case the Rock Island did inspect the car and that its inspection covered the defects found to have resulted in the injury to respondent Williams (R. 301-302), and in fact Rock Island, in delivering the car to the shipper, did so expecting to get the shipment back over its line, and in connection with its own business (R. 412). It further ignores the fact that respondent Union Pacific Railroad Company did not have possession of the

car prior to the accident, did not know that it was to have the shipment over its line, had no opportunity to make the inspection (R. 333, 342). It states that the car was immediately billed for shipment on another railroad. This is not true; the billing was not made until the day following the happening of the accident (R. 342). Nor was the car being loaded in connection with the business of the railroad over which it was shipped (R. 333, 342).

The third question is:

> "Under the circumstances stated above is the railroad company which accepts billing on the shipment, which transports the car to destination, and collects the revenue for such transportation, exempt from liability for defects in the car which might have been discovered by reasonable care?"

The third question, aside from being based on the erroneous statement of facts contained in the second question, again completely ignores the fact that the railroad which accepted billing on the shipment did not have physical possession of the car prior to the accident, did not accept billing on the car until after the accident (R. 342), did not have an opportunity to inspect the car prior to the accident, and could not have discovered the defects by reasonable care or any other care for the simple reason that it had no opportunity to exercise any degree of care whatsoever.

STATEMENT OF THE CASE

For convenience, Petitioner Chicago, Rock Island & Pacific Railroad Company will be referred to herein as the Rock Island, Respondent Union Pacific Railroad Com-

pany will be referred to as Union Pacific, and Respondent Chicago and North Western Railway Company will be referred to as North Western.

In this case petitioner Rock Island was found liable to the respondent Williams for common-law negligence in furnishing a defective car for loading to his employer, which resulted in Williams' injury. No other ground for relief was prayed for by respondent Williams against any defendant (R. 1-9).

Judgments were entered in favor of respondent Williams and against petitioner on the jury's verdict and against respondent Williams and in favor of respondents Union Pacific and North Western on the jury's verdict (R. 497-498). The verdicts in favor of Union Pacific and North Western were not appealed from and are final.

In this case petitioner Rock Island had cross-claimed against Union Pacific and North Western contending that if petitioner was held liable to respondent Williams that such respondents should be held liable over to it on the theory that they were primarily liable to respondent Williams. At the close of petitioner's evidence on the cross-claims, motions for dismissal were sustained by the District Court (R. 481; 483-486). These judgments were affirmed by the Circuit Court of Appeals.

It should be pointed out that petitioner's cross-claim against Union Pacific did not proceed on any theory that Union Pacific had contracted to indemnify petitioner Rock Island for Rock Island's own negligence, but simply on the theory that Union Pacific was primarily liable to respondent Williams and that petitioner Rock Island's lia-

bility was only secondary (R. 51).

There are so many inaccuracies in, and so much material evidence is left out of petitioner's statement of facts, particularly concerning the handling of the car, that Union Pacific feels the only practical way to meet the situation is to make its own statement in this connection.

Respondent W. E. Williams was an employee of Kansas Grain Company at the grain elevator owned by the grain company located at or near 30th Street and First Avenue in the City of Council Bluffs, Iowa (R. 220). Said elevator is located upon and served by certain sidings which are connected to a track commonly referred to and designated as the River Track (R. 220). The sidings referred to above are located in Council Bluffs, Iowa, and said sidings are operated and maintained by the North Western, Rock Island, and Chicago, Burlington and Quincy Railroad Companies, and owned by the North Western (R. 95; 281). Under agreements between the three last mentioned railroads, the North Western performs all switching on the said River Track and its sidings (R. 340). Union Pacific was not on February 10, 1953, and never has been a party to any agreement concerning the so-called River Track or its sidings (R. 94; 281).

On or about January 28, 1953, Kansas Grain Company placed with the office of the local freight agent of the Rock Island at Omaha, Nebraska, an order for 35 empty box cars for loading with grain by Kansas Grain Company (R. 340). It was the standard custom and practice of railroads such as the Rock Island, when sending cars to be loaded by the Kansas Grain Company, to

inspect such cars for defects and suitability for loading for grain prior to delivery by the railroad company from whom the cars were ordered (R. 301-302); if in the opinion of the inspecting railroad the cars were free from defects and suitable for loading for grain, such cars were then carded by such railroad for such commodity.

On February 7, 1953, preliminary to complying with the aforementioned order, the Rock Island undertook to make and did make an inspection of car RI 145287 (a car belonging to it and in its possession) for defects and suitability for loading for grain, and okayed the car for grain and carded the same "OK for grain loading" (R. 301-302).

Petitioner refers to the inspection of the car made by Bert Neumann, a Rock Island employee, on February 7, but does not set forth the type of inspection that was made. This inspection was the regular inspection given all cars sent in by Rock Island to the Kansas Grain Company, whether they expected to load them out over their line or not, and the evidence shows that it was an inspection of the mechanisms and various portions of the operating portion of the car, including the door mechanisms, the door rail, posts, etc. Rock Island's inspector testified that in inspecting the car, it was Rock Island's custom to inspect for other defects, aside from whether or not the car is able to carry grain. He said he looked at the trucks, the undercarriage, and the doors and the floor, gave it a complete check. He said:

> "I examined the wheels and truck sides, also looked at the sill steps and handles; I inspected all safety appliances, the sills and the running board on

top. * * * In inspecting car 145287 I looked underneath the car, also made an inspection of the door posts." (R. 301-302.)

He testified that this inspection was the one that he made whenever cars were sent to Kansas Grain Company (R. 302-303).

On February 9, 1953, car RI 145287, along with two other cars, was set out on the 17th Street connecting track to the River Track by a switch crew of the Rock Island and delivered to the North Western pursuant to the order of the Kansas Grain Company previously referred to (R. 340).

Whenever occasion arose for outbound shipments of grain to be made, officers or employees of Kansas Grain Company in Omaha, Nebraska, called the elevator foreman in Council Bluffs, Iowa, and would give instructions for the elevator employees to load cars, specifying the type of grain and the size of the cars to be loaded (R. 329). The grain company employees at the elevator then would load a car with what was thought to be the specified type and grade of grain (R. 332) and samples would be taken for grading by inspectors of the Omaha Grain Exchange (R. 332). As soon as the sample of grain was taken as aforesaid, the car door would be closed by employees of Kansas Grain Company and the car sealed (R. 332). After the grading of the car, the officers and employees of Kansas Grain Company in Omaha then would advise their elevator foreman in Council Bluffs, Iowa, by telephone of the destination to which the car was to be shipped and the railroad over which it would be routed (R. 331). The destination and routing of a

particular car were not determined until after the result of the grading was known (R. 333). The result of the grading would not be known in any case until after the car door was closed and sealed (R. 341). In selecting cars for outbound loading, the employees of Kansas Grain Company at the elevator would select the specific cars from the supply available. In selecting cars for loading, the elevator employees of the grain company would follow the practice of loading cars received on specific order for movement over the line of railroad furnishing the empty car, but in some instances such practice was not strictly followed (R. 330). If, however, a railroad did not receive back the particular car or cars which it delivered to the grain company it nevertheless would receive loads for transport over its own line equaling in number the number of cars which such delivering carrier had delivered (R. 330).

Car RI 145287 was loaded with shelled corn at the elevator of Kansas Grain Company on the afternoon of February 10, 1953, by employees of said elevator company (R. 233). After the car was loaded and in the afternoon of February 10, 1953, a sample of the grain was taken from the car for the purpose of having it graded (R. 253). Upon the sample being taken, the employees of the grain company started to close the door on said car, when the accident referred to in the complaint occurred at approximately 4:15 P.M., February 10, 1953 (R. 234).

After the accident and on the following day, that is, February 11, 1953, the sample of grain was graded at the Omaha Grain Exchange in Omaha, Nebraska (R. 332).

Upon the completion of the grading on February 11, 1953, the Kansas Grain Company's employees in Omaha, Nebraska, determined the destination and routing of said car (R. 333).

On February 11, 1953, a bill of lading for shipment of said car from Council Bluffs, Iowa, to Denver, Colorado, was prepared by employees of Kansas Grain Company at Omaha, Nebraska, and received by the Union Pacific on such date (R. 342), (R. 309-311).

On February 11, 1953, car RI 145287 was inspected by representatives of the Rock Island and the North Western after said accident, before the said car was removed from Kansas Grain Company's elevator track. The car was taken by the Rock Island to the repair track of the Rock Island in the City of Council Bluffs, Iowa (R. 343), and the door thereon was rehung without the car being unloaded or the shelled corn therein removed (R. 90).

On February 23, 1953, car RI 145287 was switched by a Rock Island switch crew to the Union Pacific in Council Bluffs, Iowa (R. 91). The said car was inspected by the said Union Pacific on February 24, 1953 (R. 344), and was bad ordered at that time for worn brake heads and because a door was out of the top door track (R. 231). Repairs were completed February 24, 1953 (R. 231), and thereupon Union Pacific transported the car to Denver, Colorado, over its own line of railroad (R. 231).

ARGUMENT

The argument of the petitioner does not really present an argument with respect to two of the three alleged questions which it presents for review at all. In fact, the court will note, on going through the argument, that two of the points are not specifically taken up. Its argument proceeds more in line with Points (a), (b) and (c) under the heading "Grounds on Which Jurisdiction is Invoked." Accordingly, in this argument we will devote a portion of the same to demonstrating that each of the points referred to is not well taken.

A. The ruling of the Court of Appeals relative to the separation of the issues was not erroneous.

Petitioner's Point (a) is as follows:

> "(a) The Court of Appeals for the Eighth Circuit has erroneously decided an important question of Federal Law arising under the Federal Rules of Civil Procedure, and particularly Rule 42 thereof, which has never been previously decided by this Court, but which should be here determined."

The foregoing point is simply a condensation of the first point set forth by petitioner under the heading, "Questions Presented for Review." We have previously pointed out under our analysis of these questions that petitioner failed to call to the court's attention the fact that the only request for jury trial was by Williams (R. 18); the issues between crossclaimants were not issues as to Williams. (See Rule 38 (d), Federal Rules of Civil Procedure.) Accordingly, while the judge announced that he would consider in his capacity as a judge trying the cross-claims at a later date any relevant and material evidence that might be presented in the jury trial applicable

to the cross-claims, that no evidence could be presented to the jury which was not also material and relevant to Williams' case against the railroads. The case, insofar as the jury was concerned, therefore, was a trial of the issues as between Williams and the respective railroads (R. 299-300).

The complaint herein is entirely based on the theory that the railroads were negligent either severally or jointly and concurrently. The same specific allegations of negligence are made as to each railroad (R. 1-9).

Aside from the foregoing it has been held many times that the Court has a broad discretion as to the separation of issues. Here we have pointed out the issues on the cross-claim were not issues as to respondent Williams. To have heard them at the same time as the issues which were pertinent as to him would only serve to confuse the issues. The Court's ruling in this regard was clearly in accord with Rule 20 of the Federal Rules of Civil Procedure, which provides:

> "The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice."

Rule 21, supra, provides in part as follows:

> "* * * Any claim against a party may be served and proceeded with separately."

Rule 42 (b), supra, provides as follows:

> "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any

claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

In *Meyercheck v. Givens*, 180 F. 2d 221, it was pointed out that under these rules a wide discretion is vested in the Court.

Clearly, the foregoing contention is not a novel point of law or one erroneously decided, but the holding was an entirely correct one under very definite rules of law.

B. The decision of the Court of Appeals is not in conflict with the pronouncements of the Iowa Supreme Court on the same subject.

Petitioner's Point (b) is as follows:

"(b) The Court of Appeals for the Eighth Circuit has decided an important question of Iowa law in a way directly in conflict with the pronouncements of the Iowa Supreme Court on the same subject."

Petitioner's proposition here is that the decision in the instant case conflicts with the Iowa case of *Jackson v. Chicago, M., St P. & P. R. Co.*, 238 Iowa 1253, 30 N. W. 2d 97. It is our position, first, that this case in no way sustains petitioner's position, as it contends; second, that it in fact sustains the position taken by the respondents; and third, that the decision of the Circuit Court of Appeals in this case is not in conflict with this decision, but is in accord with it.

The factual situation in the Iowa case immedintely discloses that the case does not support petitioner's theory at all. In the Iowa case the carrier held liable had actual physical possession of the car prior to the

accident and had an opportunity to inspect the same, just the opposite of the facts in this case where Union Pacific had no possession and no opportunity to inspect. The Milwaukee had delivered the car involved in the *Jackson* case empty to a shipper at Hobarton, Iowa, to be loaded and transported to Swift at Des Moines. The Milwaukee delivered the loaded car in Des Moines to the Des Moines Union Railway at 6:10 P.M., October 16, 1944. The car was delivered to the Swift plant by defendant Great Western October 20. The plaintiff, an employee of Swift & Company, was injured while attempting to unload the car on October 21. He brought the action against the initial carrier, the Milwaukee, and the delivering carrier, the Great Western, claiming that they were negligent in furnishing a car in a dangerous and defective condition for Swift's employees to unload. A verdict was returned by the jury against the Milwaukee. Upon appeal, the case was affirmed.

The court said at pages 99 and 100 of the opinion as follows:

> "When an initial carrier furnishes a car to a shipper to be loaded with freight and then delivered to a consignee whose servants are to unload the car, it is charged with the duty to exercise ordinary care to see that the car is in such state of repair that such servants, while exercising ordinary care themselves, can enter upon it with reasonable safety for the purpose of unloading it."

Insofar as its use of the term "initial carrier" is concerned, the Iowa Supreme Court was, of course, using the term in its application to the facts of that case, in which case the initial carrier had actual physical posses-

sion of the car prior to the injury. Obviously, you could not apply the term "initial carrier" to a line which was not the initial carrier at the time of the accident, as was the situation with Union Pacific. The only carrier relationship, as we have pointed out, at the time or prior to the accident, aside from the switching by North Western, was by the Rock Island (R. 430).

It is obvious from the foregoing that Iowa follows the general rule that liability is based solely on negligence, and the case supports the holding of the Court of Appeals for the Eighth Circuit in that regard.

C. The decision of the Court of Appeals for the Eighth Circuit does not conflict with decisions of the Court of Appeals of any other circuit or with its own previous decisions.

Petitioner's Point (c) is as follows:

> "(c) The Court of Appeals for the Eighth Circuit has rendered a decision which directly conflicts with the decisions of the Court of Appeals for the Third, Fourth and Sixth Circuits, and in conflict with previous decisions of the Eighth Circuit Court of Appeals itself, on the same subject."

Apparently here, although it is not entirely clear, petitioner claims that the instant decision is in conflict with the case of *Pennsylvania Railroad Co. v. Hummel*, a case decided by the Court of Appeals for the Third Circuit, 167 F. 89, and the Fourth Circuit case of *Waldron v. Director General of Railroads*, 266 F. 196. Although petitioner also says that the decision is in conflict with a decision of the Sixth Circuit, we do not find any reference made to any decision of the Sixth Circuit. It is our position that the decision of the Eighth Circuit Court of

Appeals in no way conflicts with the two above referred to cases, or with any of its other prior decisions.

In discussing the above cases, petitioner contends at page 22 of its brief that the above cases hold that there must be a shipper-carrier or carrier-consignee relationship out of which the duty to inspect arises. Any reading of these two cases clearly shows that the cases do not hold any such thing. It is true that in each case there was a shipper-carrier relationship but the decisions did not rest upon that ground. Both cases are distinguishable on the facts also since in each case the carrier held liable had actual physical possession of the car prior to the accident, with an opportunity to inspect.

In the *Hummiel* case the court makes it very clear that liability was not predicated upon contract but upon tort. This was a falling door case. The court said at page 91 of the opinion:

> "It was conceded on the argument that the liability of the defendant, if any, does not arise out of any contract."

The court, in its opinion, pointed out that if an act of negligence be immediately dangerous to the lives of others, the wrongdoer is liable to the injured party, regardless of contract, saying at page 93 of the opinion:

> "The opinion in that case, however, clearly concedes that, if an act of negligence be immediately dangerous to the lives of others, the wrongdoer is liable to the injured party whether there be any contract between them or not." (Citing cases.)

The *Waldron* case is simply authority for the proposition that whenever a carrier such as the Rock Island

furnishes a car to a shipper for loading for shipment, it is liable to the shipper or his employee for injury due to a defect in the car which might have been discovered by reasonable care in inspection. At page 198 of the opinion, the court stated the rule as follows:

> "The following statement of the law will hardly be questioned, as required by reason and comparison of the principles announced in the cases below cited. A carrier, furnishing cars to be loaded for shipment, is liable for injuries to the shipper or his employe, due to a defect in the car which might have been discovered by reasonable care in inspection. The carrier cannot impose this duty to furnish cars reasonably safe on the shipper, to its own relief from liability for injuries to an employe of the shipper. If the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employe to be loaded, the carrier and shipper are both liable to the injured employe; for the proximate cause of the injury is the defective car. But as between the carrier and the shipper the liability of the carrier is primary, for the reason that the shipper has a right to assume that cars furnished have been inspected by the carrier and found reasonably safe."

There is nothing in this case that says anything at all to the effect that there must be a shipper-carrier relationship between the parties. It is the furnishing of the car for the purpose of being loaded for shipment as the Rock Island did in this case, that places upon the carrier furnishing the car the duty to see that the car is free from defects which might have been discovered by reasonable care in inspection.

Clearly, the decision of the Eighth Circuit Court of Appeals is strictly in accordance with the foregoing cases

and not in conflict with it.

Petitioner suggests that the Eighth Circuit Court of Appeals decisions in the cases of *St. Louis-San Francisco Ry. Co. v. Ewan*, 26 F. 2d 619, and *Copeland v. Chicago, B. & Q. R. Co.*, 293 F. 12, are contrary to the instant decision. This is simply not true. Both cases clearly support the court's ruling, hold that liability is based solely on negligence and that it arises ex delicto, not ex contractu.

The leading case in the Eighth Circuit on the question of a carrier's liability for injuries arising out of a defective freight car is the case of *Copeland v. Chicago, B. & Q. R. Co.*, 293 F. 12. This case clearly sets forth the rule that a carrier is not an insurer as to the safety of its cars and is only liable for negligence. At page 15 of the opinion the court states the rule as follows:

> "*A carrier is not an insurer of the absolute safety of its freight cars and their equipment. It is held only to reasonable care.* It is bound to deliver to consignor for loading, and consignee for unloading, cars in reasonably safe condition for those who are to handle the freight in and out of them." (Emphasis ours.)

In the case of *St. Louis-San Francisco Ry. Co. v. Ewan*, 26 F. 2d 619, the court said:

> "* * * If the carrier is negligent in furnishing a defective car to the shipper, and the shipper in turn is negligent in furnishing it to his employee to be loaded, the carrier and shipper are both liable to the injured employee; for the proximate cause of the injury is the defective car. But as between the carrier and the shipper the liability of the carrier is primary, for the reason that the shipper has a right to

assume that cars furnished have been inspected by the carrier and found reasonably safe.' Waldron v. Director General of Railroads (C. C. A.), 266 F. 196, 198.

"2. The liability of the carrier does not arise out of contract but out of a duty imposed by law. Pennsylvania Railroad Co. v. Hummel (C. C. A.), 267 F. 89, 94."

At pages 25 and 26 of its brief, the petitioner refers to the case of *Rick v. New York, C. & St. L. R. Co.*, 81 A. 650, a Pennsylvania decision. In this case, plaintiff, a consignee's employee, was injured in unloading a car of iron because of a hole in the floor of the car. This case is in no way authority upon the facts or the law. In the *Rick* case the defendant railroad had an opportunity to and did inspect the car when it was first received by it from the Erie Railroad Company, then discovered a defect and returned it to the Erie Company. In a few days it was again delivered to the defendant and again inspected and this time it was accepted; still another inspection was made by defendant prior to the accident.

In other words, in the *Rick* case the defendant not only had an opportunity to inspect but did inspect on three separate occasions. Thus we find again that the factual situation in the *Rick* case not only does not support the statement made by the petitioner as to what the facts were, but also shows that the factual situation was completely contrary to the instant case, where the railroad sought to be held, insofar as petitioner is concerned, the respondent Union Pacific, had no possession of the car prior to the accident as did the defendant

in the *Rick* case, had no opportunity to inspect as did the defendant in the *Rick* case, and did not inspect as did the defendant in the *Rick* case.

Petitioner says it is not liable on the theory that it was not a carrier of the car; that there was no contract relationship prior to or at the time of the accident.

Actually, although we do not consider it necessary to liability on the part of Rock Island to the plaintiff in this case, we feel that there was a shipper-carrier relationship between Rock Island and Kansas Grain Company with respect to this car until it was billed for shipment over Union Pacific's line and notice thereof given to Union Pacific. No other theory makes sense. Rock Island receives an order from the grain company for box cars to be loaded for grain (R. 340). Rock Island proceeds to supply such cars, among which is the alleged defective car (R. 340); it inspects the car, giving it what is purported to be the same inspection it would give a car it expected to be loaded for shipment over its own line, and then causes a placard to be placed on the car stating that it was "OK for grain loading" (R. 302-303). It then switches the same to the North Western for the purpose of having the North Western spot the car at the grain company pursuant to the company's original order to be loaded for grain (R. 340). Without any change in the relationship between the parties to this point, the employees of the grain company proceed to load (R. 341) and close the car, when one of them, the plaintiff, is injured (R. 236).

From the foregoing, it is clear that there was a contract between the shipper, the grain company, and Rock

Island, whereby the Rock Island agreed to furnish a car, this car, to the grain company for loading with a shipment, which might or might not be shipped over Rock Island's line; knowing this, Rock Island undertook all duties in connection with the obligation of furnishing a proper and safe car for the purpose ordered. The grain company in its turn agreed to either ship the load in this car over Rock Island's line or ultimately give Rock Island another load in a car furnished by some other railroad in return therefor (R. 330). In fact, Rock Island's counsel admitted that it sent the car to the grain company expecting that a shipper-carrier relationship would materialize and that the car was furnished in connection with the business of Rock Island (R. 412)

The period of time which is actually involved in the determination of liability in this case commences with the ordering of the box cars by the Kansas Grain Company from the Rock Island on January 28 or 29, 1953 (R. 340), and terminates with the happening of the accident on February 10, 1953 (R. 236). During this period of time the Union Pacific had nothing to do with this car.

Aside from the foregoing, it is clear from the cases heretofore cited that liability does not depend on a contract or carrier relationship. At page 19 of its brief, petitioner quotes a portion of the first sentence only of the following from 75 C. J. S., Sec. 924, p. 333. The balance of the sentence and the following quotation from such section show that the same is directly contra to petitioner's position. It should also be noted that petitioner, in quoting the portion of the sentence that it did, misquoted, by leaving out in the third line from the top of the quotation, the words "or delivered by it":

"*A railroad company owes a duty to all persons who are required to go on or about its cars or cars which are furnished or delivered by it in connection with its business to exercise reasonable or ordinary care to inspect such cars, and to have them in such repair or condition that they may be used with reasonable safety, or to give notice or warning of defects in such cars which are discoverable by due inspection to persons who are entitled to such notice or warning.* These duties may be owing to the shipper and to his employees, with respect to loading, or to the consignee and to his employees, with respect to unloading. A breach of a duty of this nature constitutes negligence, and, for such a breach, the railroad company may be liable for resultant injury to the person to whom the duty is owing, including the shipper, an employee of the shipper, any other person rightfully about the car in connection with loading or shipment, the consignee, or an employee of the consignee. *The liability of the railroad company to a shipper's employee for furnishing a defective car arises ex delicto and not ex contractu, and the duty does not depend on the existence of a contract relationship.*

"A railroad company is not an insurer of the safety of its cars with respect to persons working on or about such cars, or of the safety of persons working on or about defective cars furnished or delivered by the company, and liability with respect to a defective car is only for negligence. *The company is not liable for injuries from defects which it has had no opportunity to discover,* from defects which no reasonably careful inspection would have uncovered, or from defects apparent to an ordinarily intelligent person." (Emphasis ours.)

Again, we emphasize that the joining of the Union Pacific as a party defendant in this case was an effort on the part of the plaintiff to join as a party defendant and charge that party with negligence which never had

an opportunity to use due care or any other kind of care with respect to this particular car, and which had no obligation to do so.

Petitioner also, on page 2 of its brief, sets forth a fourth point, which is as follows:

> "(d) The Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings in the application of the Federal Rules of Civil Procedure, and in the application of established rules of law to specific facts, and has sanctioned such departures by the District Court for the Southern District of Iowa, as to call for this Court's power of supervision."

The above is obviously an extremely general statement that calls the attention of the court to no specific thing and under such circumstances we do not feel that we are in any position to argue it. Particularly is this true in view of the fact that no attempt is made to argue the same in the "Argument" presented in petitioner's brief. We deny the truth of the statement in toto.

The petitioner has spent a major portion of its argument setting up and destroying a "straw man." At pages 23, 24 and 25 of its brief the petitioner argues that after the accident its relationship to the car was simply that of a switching carrier and makes the statement at page 23:

> "At times it has been suggested by counsel for Williams and other respondents that, since petitioner was called upon to switch the car back to Union Pacific, such fact constitutes a basis for holding that the car was being used in petitioner's business when Williams was hurt."

This statement refers to a movement after the accident. No such argument as above stated was ever made by any party to this lawsuit. No argument was based upon any proposition that liability could be predicated, insofar as petitioner was concerned, upon its handling of the car subsequent to the accident. Liability was predicated, as is shown by the record, the pleadings, the opinion of the Circuit Court of Appeals, upon the negligence of the petitioner in connection with its handling of the car prior to the accident. It is significant that at no place does counsel for the petitioner suggest or point out that the Circuit Court of Appeals or the District Court in any way relied upon the handling of the car by Rock Island subsequent to the accident as a basis for liability. At pages 24 and 25 petitioner sets forth eight citations (all, incidentally, having to do with the shipment of freight or having to do with questions of rates, and having no application to personal injury cases) upon this question, which was not a material issue in the case. The question in this case, insofar as petitioner is concerned, is with respect to what it did or did not do prior to the happening of the accident and not subsequent thereto.

D. The decision of the Court of Appeals for the Eighth Circuit was correct in denying indemnification or contribution to petitioner.

Rock Island does not, as is apparent from the pleadings (R. 45), the evidence, and its contentions as set forth in its brief, claim that Union Pacific had by contract agreed to indemnify Rock Island against the results of its own negligence. Its theory for indemnity is that its right arises by operation of law because it claims

Union Pacific was, as between Rock Island and Union Pacific, primarily liable to plaintiff.

There was, of course, no contract of indemnity between Union Pacific and Rock Island. The only agreements between the parties were as to the agreements relating to interchange, per diem, etc. No reference whatsoever is made in such agreements as to indemnity of any kind, let alone for personal injury or indemnification against the consequence of another railroad's negligence, such as Rock Island's.

Rock Island could recover over against Union Pacific only if it had been held liable by the jury by reason of Union Pacific's primary negligence, but this is just the converse of what the jury has found. Union Pacific has in fact been found not to have been guilty of any negligence whatsoever, and this, of course, is what the evidence clearly shows.

Indemnity implies a basic or primary liability in one person though a second is also liable with the first to a third.

The general rule as to indemnity from another's wrong is well stated in 42 C. J. S., Sec. 21, at page 596, as follows:

> "The law is well settled that where one who is secondarily liable is compelled to respond in damages to the injured party, he may recover the amount paid from the person primarily liable. * * *
>
> "This rule, however, rests entirely upon the proposition that as between two persons, both of whom are liable to the injured party for damages, there is a primary and a secondary liability, they not being

joint tort-feasors and in pari delicto as to the wrong causing the injury.

> "It is a well-recognized rule that an implied contract of indemnity arises in favor of a person *who without any fault on his part* is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, the former having a right of action against the latter for indemnity." (Emphasis ours.)

The general rule in Iowa as to liability with respect to indemnity, apart from express contract, is well stated in the case of *Rozmajzl v. Northland Greyhound Lines*, 242 Iowa 1135, 49 N. W. 2d 501, an Iowa case decided by the Supreme Court of that state in 1951. In that case the court said at page 506 of the opinion as follows:

> "One who is liable only by reason of a duty imposed by law for the consequences of another's negligence may recover over against the active perpetrator of the wrong. So a servant is liable to his master who is not at fault for damages the latter is compelled to pay a third person because of the servant's negligence."

Rock Island is always placed in the position of having to concede the fact that it has been found guilty by the jury of an act of negligence proximately causing the injuries to the plaintiff. Obviously if this was not the fact, there could be no judgment with respect to which Rock Island could seek indemnity. Obviously, under the evidence in this case Rock Island was no passive party. Thus Rock Island starts out with the impossible situation, in seeking indemnity, that it has been determined to have been the *active* perpetrator of the wrong done the plaintiff, and under the Iowa law, the active perpetrator of

the wrong never can seek indemnification; indemnification can only be awarded the party held liable only by reason of passive negligence.

In the case of *Lewis v. United Air Lines Transport Corporation* (USDC, D. Connecticut), 34 F. Supp. 124, 127, it was said:

> "But Air Lines overlooks the well established rule that one whose active negligence has been adjudicated cannot, in an action over, invoke the judgment as proof of his liability to the tort claimant and still escape its effect as a determination of his own primary liability precluding any recovery over."

Here Rock Island seeks to invoke the judgment of its liability to plaintiff as proof of Union Pacific's liability to it, and at the same time escape its effect as a determination of its own primary liability, which precludes any recovery over. This it cannot do.

Rock Island finally suggests that possibly the law of contribution as recently set forth in the decision of the Iowa Supreme Court in 1956 in the case of *Best v. Yerkes* (Iowa), 77 N. W. 2d 23, may possibly have some application, and while Rock Island says it does not know whether Rock Island and Union Pacific are joint tort-feasors, it claims there is such a possibility, and obviously is hoping that as a last resort the court will find that such is the fact. Of course, it is perfectly obvious that whatever else Union Pacific may be in this case, it is not a joint tort-feasor with Rock Island.

The factual situation in the *Yerkes* case can be summarized, insofar as pertinent herein, by stating that it involved a head-on collision between an automobile of

the plaintiff and the defendant's vehicle. It was claimed that one of the defendants negligently slowed down and stopped in front of the other defendant's vehicle, causing the second defendant's vehicle to collide with the plaintiff's vehicle. This is a case that clearly shows active, joint, concurring negligence by both defendants. Obviously this factual situation is in no way comparable to the instant case.

In the *Yerkes* case, the Iowa Supreme Court, at page 27 of the opinion in the Northwestern Reporter, said:

> "We have many times expressed the general rule that there can be no contribution between joint tort-feasors. But we have not squarely met and decided the precise question with which the instant case confronts us. It is this: Assuming that *active* but unintentional *negligence* of two parties *concurs* to injure a third party, do the two tort-feasors have a right of contribution against each other?" (Emphasis ours.)

The statement of the question alone here shows that the case has no application to the instant situation for the very simple reason that there must be *active negligence* of two parties *concurring* to injure a third party in order to have joint tort-feasors and contribution. Here, at most, there has been active negligence found as to but one party, the Rock Island. As a matter of fact, there is no finding of active or passive negligence of any other party but Rock Island.

We have previously demonstrated that Union Pacific cannot be shown to have been guilty of any act of negligence toward the plaintiff whatsoever.

But even if it could be argued that each party was actively negligent, such negligence could not have been concurrent. There would have been no relationship whatsoever between the acts of negligence and they would not have combined to produce the injury. If Rock Island was negligent, its duty arose and was violated several days prior to any possible duty arising or being violated on the part of Union Pacific, even under Rock Island's theory. Also, any such negligence would have been unrelated and not have combined to produce the injury.

In the case of *Kittleson v. American District Telegraph Co.*, 81 F. Supp. 25, a case decided in 1948 by the United States District Court, Northern District of Iowa, Judge Graven said, in discussing the question of the law of concurrent negligence under the Iowa law, that:

> "Under the Iowa law where separate and independent acts of negligence by different participants *combine* to produce a single injury, the negligence of the participants is regarded as being concurrent in character * * *." (Emphasis ours.)

The above case was reversed on appeal, but not in this connection.

In the *Kittleson* case, the negligence of the two defendants, although independent acts, nevertheless combined to produce the injury. Here, even if both parties were negligent, they did not combine, as required under Iowa law, to produce the injury, and certainly the two distinct acts of negligence would be successive and unrelated in operation, and as said in 65 C. J. S., Sec. 110, page 681: "If two distinct causes are successive and unrelated in operation, they cannot be concurrent."

It is perfectly clear that the basic ingredients of the contribution rule are not present in the factual situation in this case, and accordingly the doctrine would have no application under any circumstances.

CONCLUSION

Petitioner has not made a showing entitling it to a review by this court. It is clear that the decision of the Court of Appeals for the Eighth Circuit is not in conflict with the decisions of any other circuit or its own, is not in conflict with the decisions of the Supreme Court of Iowa, it did not erroneously decide the question arising as to the separation of the issues, nor did it wrongly decide any other question. We think it is clear that the decision was entirely correct and proper.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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